

CINDY A. COHN (SBN 145997)
cindy@eff.org
MARCIÀ HOFMANN (SBN 250087)
marcia@eff.org
HANNI FAKHOURY (SBN 252629)
hanni@eff.org
ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
San Francisco, CA 94110
Telephone: (415) 436-9333
Fax: (415) 436-9993 (fax)

Attorneys for *Amicus Curiae*
Electronic Frontier Foundation

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

1 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

2 Please take notice that the Electronic Frontier Foundation (“EFF”) hereby moves pursuant
3 to Civil Local Rule 7-11 for leave to file an amicus curiae brief supporting defendant Power
4 Venture’s Motion for Summary Judgment and opposing plaintiff Facebook’s Corrected Motion for
5 Partial Summary Judgment on Count 1 (CAN-SPAM Act, 15 U.S.C. § 7704) and Motion for
6 Partial Summary Judgment Under California Penal Code § 502 and the Computer Fraud and Abuse
7 Act, 18 U.S.C. § 1030. EFF also seeks leave to participate in the hearing scheduled before this
8 Court on January 23, 2012. This motion is supported by the proposed amicus curiae brief,
9 declaration of Marcia Hofmann, and proposed order filed herewith.

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11 The Electronic Frontier Foundation (“EFF”) is a non-profit, member-supported digital civil
12 liberties organization. As part of its mission, EFF has served as counsel or amicus in key cases
13 addressing user rights to free speech, privacy, and innovation as applied to the Internet and other
14 new technologies. With more than 16,000 dues-paying members, EFF represents the interests of
15 technology users in both court cases and in broader policy debates surrounding the application of
16 law in the digital age, and publishes a comprehensive archive of digital civil liberties information at
17 www.eff.org.

18
19 EFF has already assisted the Court in this case by filing two amicus briefs regarding
20 Facebook’s claim under California Penal Code § 502(c). (Dkt. Nos. 78-1 & 83.) EFF has also
21 helped other courts to interpret and apply computer crime statutes to modern communications
22 technologies in cases such as *United States v. Drew*, 259 F.R.D. 449, 465 (C.D. Cal. 2009); *United*
23 *States v. Nosal*, 642 F.3d 781 (9th Cir. 2011), *rehearing en banc granted*, 661 F.3d 1180; and
24 *United States v. Cioni*, 649 F.3d 276 (4th Cir. 2011).

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26 EFF’s continuing interest in this case is the sound, principled and fair application of the law
27 to online activities and systems, especially as the law affects both the users of online systems and
28

1 the innovators who improve the experience of users. EFF is especially concerned about Facebook's
2 core claim: that Facebook users who chose to use third parties to automate access to their
3 information stored with Facebook expose the third parties that assist them, and potentially
4 themselves, to serious civil and criminal liability. Here the liability arises from Facebook's claims
5 under California's computer crime statute (California Penal Code § 502), and the Computer Fraud
6 and Abuse Act (18 U.S.C. § 1030) and the CAN-SPAM Act (15 U.S.C. § 7704).
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8 If the Court permits the filing of this amicus brief, EFF will argue that Facebook's claims
9 are all based on a single underlying theory. Facebook contends that because Power's service
10 enabled Facebook users to automate actions using their own data that they could have performed
11 themselves manually, Power has violated the law. In the case of the Computer Fraud and Abuse
12 Act and California Penal Code § 502(c), the user had to provide her own valid username and
13 password through Power to obtain access to Facebook and her own social networking data. In the
14 case of the CAN-SPAM Act, the user had to affirmatively opt in to the promotion to allow Power
15 to automate Facebook's Event invitation feature. In both contexts, Facebook's claims are legally
16 wrong and dangerous as a matter of policy, thwarting consumer choice and giving service
17 providers the power to manufacture and cherry-pick anti-competitive lawsuits against follow-on
18 innovators.
19

20 As noted in the accompanying Declaration of Marcia Hofmann, EFF has discussed this
21 brief with counsel for both the plaintiff and defendant. Power has consented to the filing of this
22 brief. Hofmann Decl. ¶ 2. Facebook objects to the filing of this brief. Hofmann Decl. ¶ 3.
23

24 EFF requests that the Court grant leave to file its brief as amicus curiae in support of
25 defendant Power Ventures' Motion for Summary Judgment on Cal. Penal Code § 502(c) and in
26 opposition to plaintiff Facebook's Corrected Motion for Partial Summary Judgment on Count 1
27 (CAN-SPAM Act, 15 U.S.C. § 7704) and Motion for Partial Summary Judgment Under California
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1 Penal Code § 502 and the Computer Fraud and Abuse Act, 18 U.S.C. § 1030. EFF also respectfully
2 asks that the Court permit EFF to participate in the hearing scheduled before this Court on
3 January 23, 2012.

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5 DATED: January 17, 2012

Respectfully submitted,

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7 ELECTRONIC FRONTIER FOUNDATION

8 By: /s/ Marcia Hofmann _____

9 CINDY A. COHN
cindy@eff.org
10 MARCIA HOFMANN
marcia@eff.org
11 HANNI FAKHOURY
hanni@eff.org
12 ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
13 San Francisco, CA 94110
Telephone: (415) 436-9333
14 Fax: (415) 436-9993 (fax)

15 Attorneys for *Amicus Curiae*
16 ELECTRONIC FRONTIER FOUNDATION

CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2012, I electronically filed the foregoing document with the Clerk of the Court, using the CM/ECF system, which will send notification of such filing to the counsel of record in this matter who are registered on the CM/ECF system.

Executed on January 17, 2012, in San Francisco, California.

/s/ Marcia Hofmann
Marcia Hofmann